

SAVE OUR ECOSYSTEMS, INC.

IBLA 82-410

Decided June 19, 1984

Appeal from decisions of the Eugene District Manager, Bureau of Land Management, finding proposed 1982 spring and summer/fall herbicide spraying programs involved no significant impacts beyond those analyzed in a prior environmental impact statement.

Vacated and remanded.

1. Environmental Quality: Environmental Statements -- Environmental Quality: Herbicides -- National Environmental Policy Act of 1969 -- Environmental Statements

A decision to implement a vegetative management program with herbicide spraying will be reversed where it is based on an environmental assessment which fails to include a "worst case" evaluation of the environmental impacts of the proposed program, and where the record fails to document effects upon the environment of the proposed spraying program.

APPEARANCES: Michael Slattery, for appellant; Eugene A. Briggs, Esq., Office of the Solicitor, Eugene, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Save Our ecoSystems, Inc. (SOS), appeals two decisions of the Eugene District Manager, Bureau of Land Management (BLM), dated January 15, 1982, and June 4, 1982, which find the proposed spring herbicide spraying program and the proposed summer/fall herbicide spraying program involve no significant impacts beyond those previously analyzed in the Department's environmental impact statement (EIS), entitled Vegetation Management with Herbicides: Western Oregon, 1978 through 1987. The appeals are consolidated because of the similarities of issues and facts involved.

The District Manager's decision of January 15, 1982, approved application of Environmental Protection Agency (EPA)-registered herbicide on 1,084 acres of BLM land in the Eugene District. This decision was based on a site-specific environmental assessment (EA), made available for public review on November 18, 1981, proposing to treat 10,384 acres by various means in order to prepare the sites for planting, maintain established seedlings, reduce competition on established seedlings and saplings, and provide for right-of-way maintenance. This EA was prepared in conformity to the EIS

which required each district office to prepare an annual environmental analysis of proposed herbicide use to supplement the EIS. On the basis of the EIS, Secretary of the Interior Andrus approved the use of herbicides (except silvex) for vegetation management in a 1979 decision.

Appellant argues that the District Manager's finding of no significant impact is in error. It maintains that significant adverse impacts will occur to conifers, human beings, vegetation, wildlife, soil, water, air, and other resources. A site-specific EIS is required in appellant's view. Appellant's comments to the EA are appended to its statement of reasons on appeal. In this statement of reasons, SOS questions, inter alia, the need for vegetative treatment, the effectiveness of release 1/ on timber yield, BLM's ability to compare the effectiveness of various management techniques, 2/ the effectiveness of herbicides, and BLM's implementation of a 1982 Government Accounting Office (GAO) report.

On two prior occasions, this Board has dismissed similar appeals by SOS on the grounds that we lacked jurisdiction to entertain an appeal from a decision to use herbicides where the Secretary had approved the use of herbicides following issuance of an EIS. As noted above, on March 15, 1979, the Secretary concluded that the use of herbicides (except silvex) was an appropriate method of managing vegetation. BLM's decision to use herbicides, we held, was not a matter reviewable by the Board unless it was established the use of herbicides in a given case was a violation of the Secretarial order. An example of such a violation would be BLM's failure to implement mitigating measures established in the EIS. 3/ No violation of the Secretary's order has been cited by appellant. However, in Dolores Lisman, 67 IBLA 72 (1982), the Board found that implementation of the Secretary's decision to use herbicides may give rise to issues entirely outside the scope of that decision. One issue mentioned in Lisman was whether a BLM District Office had adequately considered alternatives to herbicide use at a particular site. See also SOCATS (On Reconsideration), 72 IBLA 9 (1983). Lisman observed that our approach to reviewing appeals of the present type was consistent with our duty to insure that, in preparing an EA, BLM has developed a reviewable record reflecting consideration of "all relevant factors." Lane County Audubon Society, 55 IBLA 171 (1981); see Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir.), cert. denied, 409 U.S. 990 (1972); Elaine Mikels, 44 IBLA 51 (1979).

The second decision that SOS appeals from is BLM's decision, dated June 4, 1982, to apply EPA-registered herbicide on 3,793 acres in the Eugene

---

1/ Release is the reduction of competition for light, moisture, and nutrients between hardwood trees, shrubs, or grass and existing conifer seedlings. By reducing competition, conifers will grow rapidly beyond the point where they can be overtopped and suppressed by surrounding vegetation (EIS at 1-30).

2/ Management techniques available to BLM include: Manual treatment, mechanical treatment, burning, herbicides, precommercial thinning, biological treatment, and right-of-way maintenance (EA at vi).

3/ Save Our ecoSystems, IBLA Order, Oct. 28, 1982; Save Our ecoSystems, IBLA Order, Apr. 28, 1981; Susan Delles, 66 IBLA 407 (1982).

District during the 1982 summer/fall spray program. This decision, like that above involving the 1982 spring program, was preceded by BLM's site-specific EA. The EA set forth the proposed action and its alternatives, the environmental impacts of the proposed action and alternatives, and mitigating measures. This EA is identical to that relied upon by BLM in preparing its 1982 spring program.

In Southern Oregon Citizens Against Toxic Sprays (SOCATS) v. Clark, 720 F.2d 1475 (9th Cir. 1983), the court held that 40 CFR 1502.22 requires the Department to perform a "worst case analysis" prior to continuation of its herbicide spraying program in Oregon. Reviewing the district court's finding that there was considerable uncertainty concerning the effect of the Department's use of herbicides upon the public health, the court of appeals upheld the district court ruling enjoining use of herbicides based upon decisions in Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983), and Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Okla. 1983), and upon its interpretation of 40 CFR 1502.22, the "worst case analysis" regulation. The decision in SOCATS is directly controlling here, for the court's decision unequivocally finds BLM's herbicide program plan has failed to consider "all relevant factors" in this crucial area.

The "worst case analysis" regulation, 40 CFR 1502.22, provides:

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

The worst case analysis required of the Department prior to continuation of herbicide use in Oregon is described at 720 F.2d at 1479:

The district court holding here accords with those later cases and with a common sense interpretation of § 1502.22. The

government did not challenge the court's finding that "there is uncertainty about what is the safe level of dosage -- or if there is one." The possibility that the safe level of dosage for herbicides is low or nonexistent creates a possibility of "significant adverse effects on the human environment." 40 C.F.R. § 1502.22. This potential calls for a worst case analysis.

The BLM's contention that it need not analyze a "worst case" unless it is "probable" contradicts the clear language of § 1502.22. This section requires that the agency prepare a worst case analysis "and indicat[e] to the decisionmaker 'the probability or improbability of its occurrence.'" Sigler, 695 F.2d at 974 (emphasis in original) (quoting 40 C.F.R. § 1502.22). The agency may not omit the analysis only because it believes that the worst case is unlikely.

The court considered and rejected arguments that registration with the EPA of the herbicides used obviated the need for a worst case analysis and that the worst case analysis regulation should not apply to EA's. The SOCATS court concluded, 720 F.2d 1480, 1481:

The programmatic EIS and the EA were inadequate without a worst case analysis. Including a worst case analysis in the EA allows the BLM to consider the scientific uncertainty in the least cumbersome manner, without having to prepare a new or supplemental EIS. See Warm Springs Dam, 621 F.2d at 1027 (Kennedy, J., concurring) (approving agency decision to respond to a new environmental concern without preparing a formal EIS or supplement).

We hold that the BLM must prepare a worst case analysis before it may resume spraying and the annual EA is an appropriate place to include it. [Emphasis in original.]

The SOCATS decision holds that a worst case analysis is required: a later decision, Save Our ecoSystems v. Clark, No. 83-3908 (9th Cir. Jan. 27, 1984, petition for rehearing filed Mar. 13, 1984), rejects as inadequate the worst case analysis prepared by BLM in response to the SOCATS decision. Commenting upon the BLM analysis, the court observes, slip op. at 8, 9, 23:

The WCA [worst case analysis] prepared by the BLM is brief and cursory, and proceeds from an entirely wrong assumption. The BLM admits that no level of exposure to the herbicides has been proven safe, but assumes in the WCA that "a point is reached at which it becomes clear that no human health effect will occur." Judge Belloni said, "Plainly, the worst result that can occur as a result of proceeding in the face of uncertainty as to whether a herbicide causes cancer is that it does cause cancer." Slip op. at 5. We agree. We observed in SOCATS that, "The possibility that the safe level of dosage for herbicides is low or nonexistent creates a possibility of 'significant adverse effects on the human environment' . . . This potential calls for a worst case analysis." [720 F.2d at 1479], quoting 40 C.F.R. § 1502.22.]

The BLM argues that the analysis plaintiffs say is necessary would be pure guesswork because no credible data exist to support the proposition that cancer can occur at any dose. This contention is specious in light of the evidence presented by plaintiffs' experts and the holding of SOCATS that "[t]he agency may not omit the analysis only because it believes that the worst case is unlikely." [720 F.2d at 479], see also Sigler, 695 F.2d at 974 ("that the possibility of a total cargo loss by a supertanker is remote does not obviate the requirement of a worst case analysis"). 8/ The duty of an agency is to analyze the costs and environmental effects of the worst case and its costs and then to provide its assessment of the likelihood of the event occurring. The district court was correct in finding the WCA deficient.

---

8. We do not imply that the contents of the WCA prepared by the BLM should not be part of the amended WCA. The amended WCA, of course, should contain a discussion of events of low probability and catastrophic effect as well as events of higher probability but less catastrophic effect. For example, noting that although data is incomplete, a person applying the herbicide who accidentally received a massive dose could become seriously ill is clearly appropriate. The possible effects of the unlikely event of a spill on the BLM personnel may be important to the decisionmaker as well as the possible effect of the calculated dose on the environment.

The record in Merrell reveals that it is the policy of the BLM to avoid discussion of the toxicity of the herbicides it uses. The BLM Field Guide to Policies and Procedures Required for Vegetation Management With Herbicides in Western Oregon states:

[t]opics which address issues of herbicide toxicity and/or human health effects should be avoided. Such subject matter is more appropriately discussed by expertise in other Federal or State agencies. Simply stated, our position is: that so long as herbicides are registered and approved for forestry use by EPA, BLM may appropriately use such chemicals within specified procedural safeguards.

ECR at 283, Merrell v. Block (emphasis added in original). This policy is clearly impermissible. [Footnote 9 omitted.]

The SOS decision goes on to hold that an EA which incorporates a worst case analysis of the effects of chemicals upon the environment may require the lead agency preparing the EA to perform independent research into the environmental consequences of its proposed actions. Slip op. at 14. The court concludes that, until the agencies involved comply with the requirements of law as explained by the court's opinion, the entire spraying programs of both

BLM and the U.S. Forest Service are enjoined. Under these circumstances, this appeal is properly remanded to BLM for appropriate further action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Eugene District Manager are vacated. This matter is remanded to BLM for further action consistent with this opinion.

Franklin D. Arness  
Administrative Judge

We concur:

C. Randall Grant, Jr.  
Administrative Judge

Bruce R. Harris  
Administrative Judge

